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IN THE

Supreme Court of the United States

October Term, 1964

No. 278

MONOLITH PORTLAND CEMENT COMPANY, a corporation,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and WILLIAM M. BENNETT, PETER E. MITCHELL, EVERETT C. McKEAGE, GEORGE G. GROVER, and FREDERICK B. HOLOBOFF, the members of and constituting said Public Utilities Commission,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	3
Constitutional and statutory provisions involved	3
Statement	4
Reasons for granting the writ	10
Conclusion	17
Appendix—Order denying Writ of Review	App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Aaron v. Cooper, 358 U. S. 1	10
Ayrshire Collieries Corp. v. United States, 335 U. S. 573	8
Blue Diamond v. Santa Fe, 171 I. C. C. 175	16
Colgate v. Harvey, 296 U. S. 404	11
Frost v. Corporation Commissioner, 278 U. S. 515	11
Hartford S.B.I. & Ins. Co. v. Harrison, 301 U. S. 459	11
Hill v. Texas, 316 U. S. 400	17
Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278	10, 11
Huerfano Coal v. Colorado & Southeastern et al., 41 I. C. C. 657	15
Louisville & N. R. Co. v. United States, 282 U. S. 740	16
Louisville Gas & E. Co. v. Coleman, 277 U. S. 32	11
Monolith Portland Cement Company v. Santa Fe, 169 I. C. C. 689	15
Shelley v. Kraemer, 334 U. S. 1	10, 11
Southern Pacific Railroad Co., et al., 1 C.R.C. 470	7
United States v. Baltimore & Ohio R. Co., 333 U. S. 169	6, 10, 13, 15, 17
Virginia, Ex Parte, 100 U. S. 339	10
Virginian Railway Co. v. United States, 272 U. S. 658	15

Rules	
Rules of Supreme Court of United States, Rule 23(1)(i)	2

Statutes	Page
California Constitution, Art. XII, Sec. 21	3
California Public Utilities Code, Sec. 453	3
California Public Utilities Code, Secs. 454-455	5
California Public Utilities Code, Sec. 1731	6
California Public Utilities Code, Sec. 1756	2, 6
California Public Utilities Code, Sec. 1757	4
California Public Utilities Code, Sec. 1760	2, 4
United States Code, Title 28, Sec. 1257(3)	2
United States Constitution, Fourteenth Amendment	2, 3, 13, 15, 17
United States Constitution, Fourteenth Amendment, Sec. 1	3

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Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Monolith Portland Cement Company prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California in the above-entitled case.

Opinions Below.

The decision of the California Public Utilities Commission is reported in 62 California Public Utilities Commission Decisions 49.* Neither the decisions of the California Public Utilities Commission denying rehear-

*Because the California Public Utilities Commission Decisions may not be readily available to the Court, Petitioner is filing concurrently with this Petition ten copies of the advance sheet containing the Opinion.

ing nor the order of the California Supreme Court denying, without opinion, the Petition for Writ of Review are officially reported.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C., section 1257(3).

The order of the California Supreme Court denying the Petition for Writ of Review was filed June 16, 1964. Petitioner's primary attack in that Court of the decision below was that Petitioner's rights under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment had been violated. This attack is amply demonstrated by the quotation from the Petition for Writ of Review set out in this Petition at page 6.* Under the applicable statute, California Public Utilities Code, section 1760, this attack required the Court to exercise its independent judgment both as to the law and the facts regarding the constitutional questions. Unavoidably, however, since the California Supreme Court denied relief to Petitioner without opinion, its determination against Petitioner of these important constitutional questions was not specifically articulated.

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*No formal record of the proceedings in the California Public Utilities Commission was transmitted to the California Supreme Court. (California Public Utilities Code, section 1756). The Petition for Writ of Review, together with its appendices; and the Reply to Answers to Petition for Writ of Review were the answers to the Petition, the only documents filed in the California Supreme Court and are submitted as the record in the case. *Rules of Supreme Court of United States*, Rule 23(1)(i). One certified and nine additional copies are fil 1 herewith.

The Petition for Writ of Review will be referred to herein as Petition for Review. The appendix to the Petition for Review, which has been certified by the California Public Utilities Commission, will be referred to herein as Petition For Review, Appendix.

Question Presented.

Whether the State of California and its agencies may constitutionally authorize lower intrastate railroad freight rates to some shippers than to other similarly situated shippers and localities for the same transportation service, solely because of a joint trackage agreement between two railroads which provides (as between the railroads) a surcharge-penalty against shipments originating in one locality; or whether such discrimination is repugnant to the Equal Protection and Due Process clauses of the Fourteenth Amendment?

Constitutional and Statutory Provisions Involved.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "Section 1. . . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 12, Section 21 of the California Constitution provides in pertinent part:

> "No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons . . ."

Section 453 of the California Public Utilities Code provides:

> "No public utility shall, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No pub-

lic utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. The commission may determine any question of fact arising under this section."

Section 1757 of the California Public Utilities Code provides in pertinent part:

"No new or additional evidence may be introduced in the Supreme Court . . . The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State . . ."

Section 1760 of the California Public Code provides:

"In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."

Statement.

Petitioner, Monolith Portland Cement Company, operates a cement plant adjoining a railroad track between Mojave and Bakersfield, California—the mountain rail gateway between Northern and Southern California—which is owned by the Southern Pacific Company and

jointly operated by the Southern Pacific Company and its lessee, the Atchison, Topeka & Santa Fe Railway Company, as part of their intercontinental systems.

This controversy concerns the constitutionality of the establishment of reduced rail cement rates to three of petitioner's competitors, while denying the same basis of rates to petitioner for the same transportation service — the transportation of cement to common destinations, solely because of the Santa Fe-Southern Pacific trackage agreement.

Petitioner timely protested Santa Fe's publication of such rates as a violation of California's organic transportation law requiring non-discriminatory rates, and under California procedure, the California Public Utilities Commission suspended the rates in question and initiated an investigation (Calif. Pub. Util. Code, §§ 454-455). Following a hearing, the Commission found as a fact that all the actual costs and circumstances of transportation were the same for petitioner as for its competitors. However, the Commission concluded as a matter of law that notwithstanding such factual identity in transportation conditions, the proposed reduced rates in favor of petitioner's competitors were justified because of the collateral joint trackage agreement between the Santa Fe and Southern Pacific which imposed penalty payments upon Santa Fe for freight (such as petitioner's cement) originating on the leased track.

Following the Commission's decision (when it first became apparent that such proposed rates would be established on the supposed justification of the joint trackage agreement, notwithstanding the proven discrimination involved) petitioner exhausted its adminis-

trative remedy by petition for rehearing (Calif. Pub. Util. Code § 1731), and timely applied to the California Supreme Court for a writ of review (Calif. Pub. Util. Code § 1756) — the only legal procedure available under California law — alleging that the stated basis of the Commission's decision offended the Due Process and Equal Protection Clauses of the Fourteenth Amendment. [Petition for Review, pp. 3-4]* The California Supreme Court, notwithstanding this Court's many decisions proscribing the use of such trackage agreements to justify discriminatory practices (e.g., *United States v. Baltimore & Ohio R. Co.*, 333 U.S. 169 (1948), denied such petition, without opinion. [A certified copy of the denial is filed herewith, and is also printed as an appendix to this petition.]

The significant facts are undisputed. The Atchison, Topeka & Santa Fe Railway Company and the Southern Pacific Company are railroad common carriers which own and operate intercontinental railway systems. In each case, the railroad's western terminus is in California. Each railroad has its own trackage system, except for one short section of track between Mojave and Bakersfield, California, owned by Southern Pacific and used by Santa Fe. The original 50 year contract govern-

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*". . . Basically, petitioner maintains that the Commission denied petitioner the equal protection of the law and deprived it of its property without due process of law, in that it based its Decision herein complained of upon a legally erroneous principle . . .

* * * *

"Petitioner has no remedy except by this petition, and unless a Writ of Review is granted, petitioner will be denied the judicial review to which it is entitled under the Constitutions of California and of the United States." [Petition for Review, pp. 3-4]

ing Santa Fe's use of and payment for the use of the leased track (which was approved without public hearing in 1912)* expired January 1, 1962, and no new contract has been executed. The two railroads were in disagreement as to the terms of a new agreement, and submitted their dispute to the Interstate Commerce Commission, which has not yet acted. In the interim, the two railroads have agreed to continue to operate under the terms of the expired 1912 contract, and that the terms of any new arrangement shall be retroactive to January 1, 1962; and the Interstate Commerce Commission has approved maintaining the status quo, but has expressly refrained from passing on the merits of the railroads' controversy [Petition for Review, Appendix, Exhibits D, E].

The 1912 contract provided that as compensation for the use of Southern Pacific's track Santa Fe would pay a certain fixed rental, its prorata share of track operations' cost and taxes, and finally, as a surcharge, 60% of Southern Pacific's local rate for any traffic Santa Fe picked up or delivered along such track. [Opinion, page 57]. The constitutionality of using this 60% penalty-surcharge feature of the Santa Fe-Southern Pacific arrangement to justify otherwise discriminatory rates is the nub of the present case.

The sketch prepared by the California Commission and attached to its Decision to illustrate the locations

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Southern Pacific Railroad Co., et al., 1 C.R.C. 470, 471 (1912).

of the cement plants and railroad lines involved [Opinion, page 51], appears on the opposite page.* As shown by such sketch, and as found by the Commission, of the four cement plants involved Monolith is squarely between its competitors' plants and the northern market and is the most centrally located to furnish the cement needed for construction of the Feather River Acqueduct System — a joint State-Federal project. [Opinion, page 50].

Since cement is a standard commodity, transportation costs are the key to its market price [Opinion, pp. 50, 55], and a difference of a few cents per barrel is sufficient to divert a cement contract from one plant to another,** petitioner's competitors persuaded Santa Fe to reduce its rates for transportation from their more distant plants to common northern destinations (without lowering petitioner's rates proportionately) in order to offset petitioner's natural competitive advantage and permit such plants to penetrate the new, attractive market at petitioner's expense [Opinion, pp. 49, 50].

Petitioner contended that judged by all the traditional criteria for making such comparison, the standard of transportation for the carriage of cement from all Southern California cement plants was the same, and since the suspended rates were admittedly lower, mile for mile than petitioner's existing rates from Monolith north [Opinion p. 11], such rates were discriminatory.

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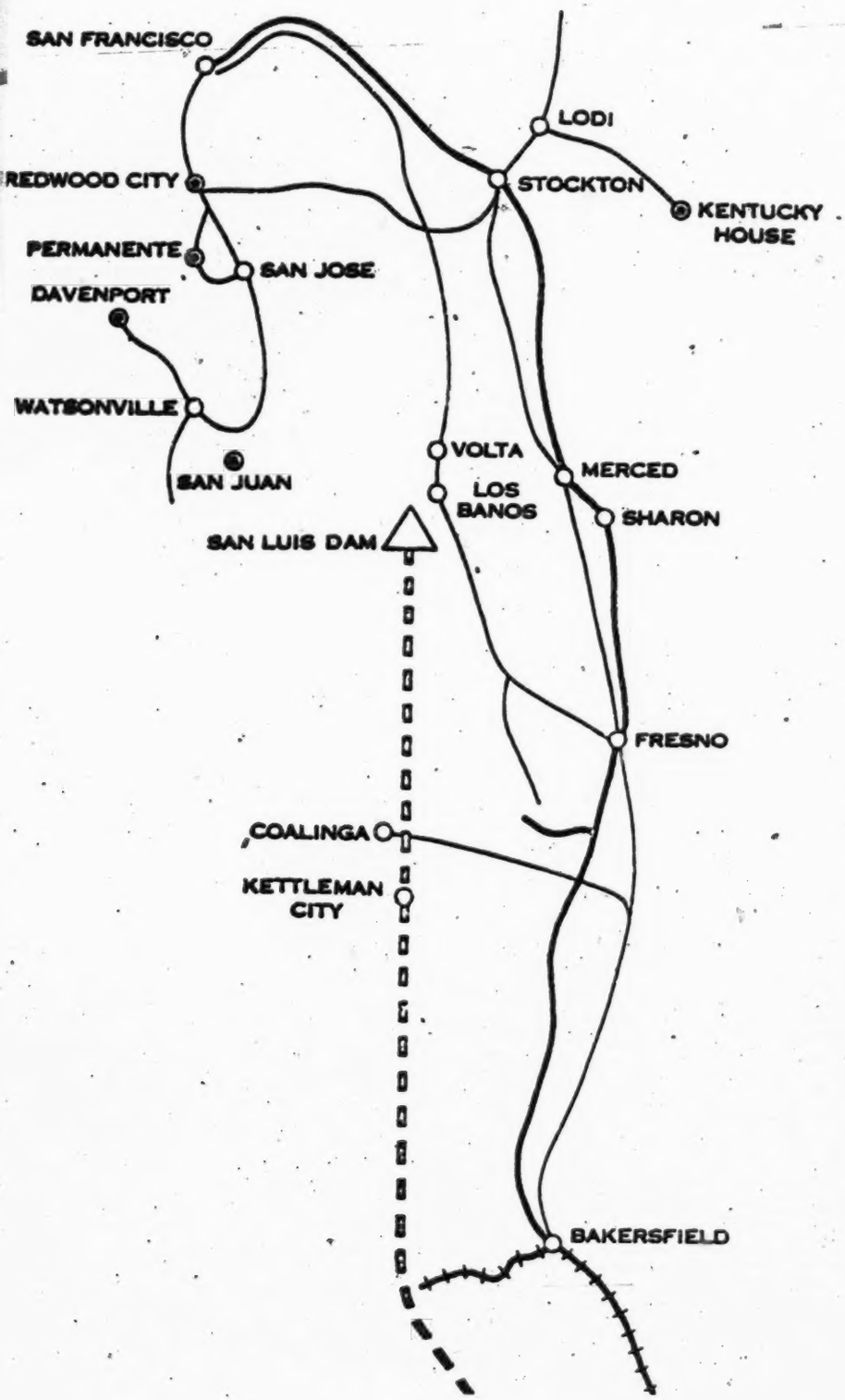
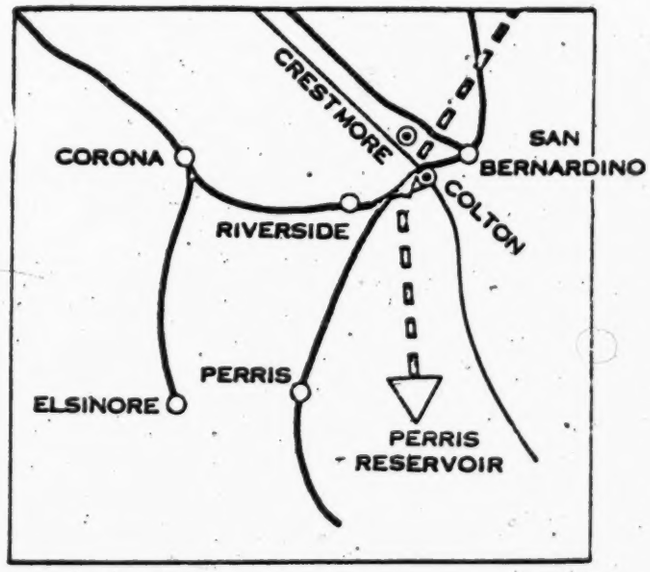
*This sketch was included in the original Public Utilities Commission decision served on the parties to the proceeding. It is referred to at page 51 of the advance sheet printing of the decision, but as pointed out at page 64 of the advance sheet it was omitted from the advance sheet printing.

**See *Ayrshire Collieries Corp. v. United States*, 335 U.S. 573, 586 (1949).

APPENDIX "A"

CASE NO. I & S 7598





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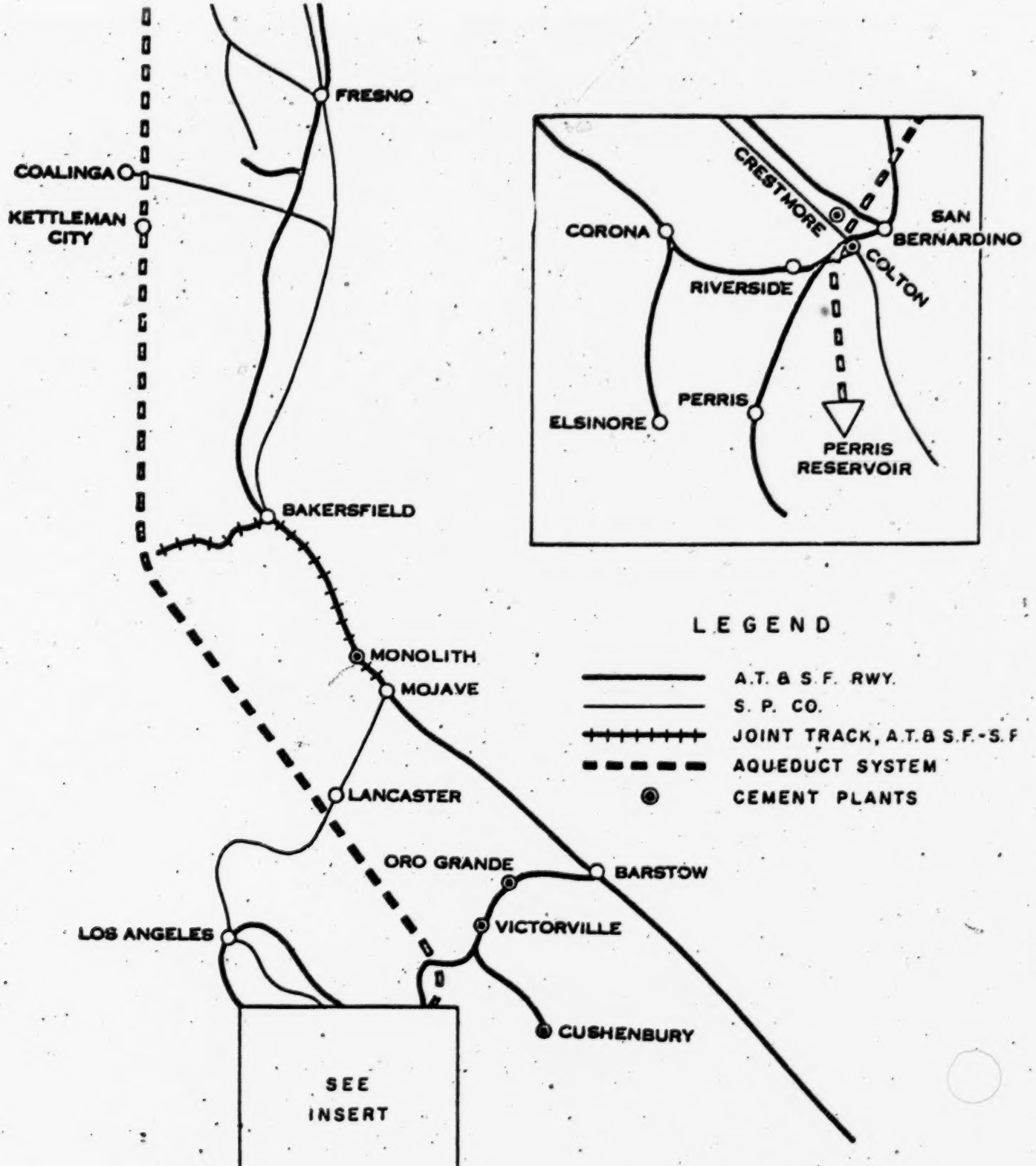
FRESNO
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BAKERSFIELD
MONOLITH
MOJAVE
LANCASTER
ORO GRANDE
BARSTOW
VICTORVILLE
LOS ANGELES
CUSHENBURY
SEE INSERT
CRESTMORE
SAN BERNARDINO
CORONA
COLTON
RIVERSIDE
PERRIS
ELSINORE
PERRIS RESERVOIR
LEGEND
A.T. & S.F. RWY.
S. P. CO.
JOINT TRACK, A.T. & S.F.-S.P.
AQUEDUCT SYSTEM
CEMENT PLANTS

The California Commission meticulously compared the proposed service to petitioner's competitors with service to petitioner, and agreeing with petitioner, found that under all the traditional factual criteria, all conditions of transportation were either identical or substantially similar [Opinion, 54-56];* found that petitioner's existing rates were higher than the proposed rates [Opinion p. 55-56]; but concluded that the 60% penalty trackage payments made by Santa Fe to Southern Pacific were properly assignable solely to petitioner,

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*More specifically, the Commission found that:

(1) *The transportation services are the same*—the services rendered in the transportation of bulk cement from the group mills "involve substantially the same services as are rendered in the transportation of bulk cement from Monolith";

(2) *The commodity is the same*—"Portland cement is a low-grade, heavy loading commodity produced to meet standard specifications, and both the group mills and Monolith produce such cement";

(3) *The cement plants are on a price parity*—"Each plant competes one with the other . . . : and no one of the producers can obtain a greater price for its cement than the other. Portland cement, except on rare occasions, is sold by the plants on an F.O.B. delivered basis and said plants bear the transportation charges";

(4) *Both rates are on the same volume basis*—"Respondent maintains volume rates from all of those plants to San Joaquin Valley subject to carload minimum weights of marked capacity of car used but not less than 150,000 pounds";

(5) *The route, track and mileage is identical*— ". . . from Monolith to the north the physical transportation from all of those plants to the San Joaquin Valley is identical";

(6) *The accessorial services are the same*—"The form of tender of shipments and the facilities for the tendering of carload shipments at those plants are substantially the same";

(7) *The probability for the generation of new business for Santa Fe by the new rates is the same*—"The evidence does not show that Monolith would not use Santa Fe nor make greater use of Santa Fe for the transportation of cement to San Joaquin Valley points if the rates from Monolith were to be reduced."

thus justifying the discriminatory rates. Thus, the sole predicate for such discrimination was the Santa Fe-Southern Pacific trackage arrangement.*

Simply stated, the thrust of the Commission's Decision is that the particular formula by which two railroads agree how a total annual track rental shall be computed can legally convert otherwise discriminatory rates for the same service to non-discriminatory rates.

Reasons for Granting the Writ.

The decision of the California Supreme Court, refusing to correct the authorization by the California Public Utilities Commission of plainly discriminatory railroad freight rates is in conflict with the decisions of this Court requiring the states to scrupulously observe the Constitutional guarantee of equal protection of the laws. *Ex Parte Virginia,* 100 U.S. 339; *Home Telephone & Telegraph Co. v. Los Angeles,* 227 U.S. 278; *Shelley v. Kraemer,* 334 U.S. 1; *Aaron v. Cooper,* 358 U.S. 1. This alone justifies granting a writ of certiorari. There is, however, an equally important reason for granting the writ. The California Supreme Court has failed—perhaps even refused—to follow the plain teaching of this Court's decision in *United States v. Baltimore & Ohio R. Co.,* 333 U.S. 169, in a context which is indistinguishable. Respect for the orderly resolution of disputed questions of federal law requires the correction of any such marked disregard of the Court's decisions.

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*As the *Opinion* acknowledges: (Opinion, p. 56.)

"Inasmuch as Respondent [Santa Fe] has suggested *no* other differences in transportation circumstances and conditions between the points involved, and because Monolith and Santa Fe vigorously disagree regarding the competency, relevancy and materiality of the expense [contract], it is necessary to consider . . . the contract . . ." (Emphasis added)

1. "It may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances [citations] and that it applies to the exercise of all the powers of the state which can affect the individual or his property." *Hartford S.B.I. & Ins. Co. v. Harrison,* 301 U.S. 459, 461-462. Of course, the equal protection clause "does not preclude the states from resorting to classification for the purposes of legislation". *Colgate v. Harvey,* 296 U.S. 404, 422. "But the classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike' [citations]. The classification, in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones." *Colgate v. Harvey,* supra (296 U.S. at 423). The question always is: does the state's action arbitrarily and without genuine reason impose a burden upon one group of persons from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation. "*Mere* difference is not enough . . ." *Louisville Gas & E. Co. v. Coleman,* 277 U.S. 32; *Frost v. Corporation Commissioner,* 278 U.S. 515.

Of course, the action of a state regulatory commission, to which has been delegated legislative power, falls within the ambit of the equal protection clause, if its classifications offend against the rule, *Home Telephone Telegraph Co. v. Los Angeles,* 227 U.S. 278, as does a state judiciary which sanctions such deviation. *Shelley v. Kraemer,* 334 U.S. 1.

Here, the sole ground of the California Public Utility Commission's approval of the discriminatory rates in question to petitioner's competitors was that under the Santa Fe-Southern Pacific joint trackage arrangement there was a surcharge-penalty assessed by the railroads against freight from petitioner's locality.

But the existence of such an arrangement between the railroads is not a "genuine reason" why one group of shippers should pay higher rates than another group otherwise similarly circumstanced and thus redeem the carrier's private, collateral contract. The prohibition against discrimination is absolute; not relative. The Constitution does not say that there shall be equal protection "except . . ."; it forbids discrimination. The attempt by a railroad to pass on directly to one group of its customers the surcharge-penalty feature of a private contract the benefits of which inure to *all* of its customers is not a rational classification under this Court's decisions.

As the record shows without dispute, Santa Fe's use of the Southern Pacific Mojave-Bakersfield track instead of building its own has been and is a benefit to all of its customers — not just to the shippers physically located upon such track. To illustrate: if Santa Fe duplicated the Southern Pacific track and built its own Mojave-Bakersfield track, could it lawfully levy the capital cost of such track solely against shippers located on such track? Of course not! Such a cost must be spread against all traffic that moves over such track.

We repeat, the supposed distinction between shippers and localities upon the joint track and other similar shippers and locations does not have "a fair and substantial relation to the object" of rate-making — the

creation of a compensatory, non-discriminatory rate structure. Instead, it rests upon the quicksand of the railroads' contract language, hammered out in private bargaining sessions. Such a situation (and the State's sanction thereof) is repugnant to the Fourteenth Amendment.

2. As we have shown, the decision below is directly opposed to this Court's decisions applying the equal protection clause to strike down distinctions without a difference. It is also in direct conflict with half a century of this Court's decisions in the area of federal transporation law, as crystalized in *United States v. Baltimore & Ohio R. Co.*, 333 U.S. 169.

The relevant facts of the *Baltimore & Ohio* case were these. A stockyard's company owning a segment of railroad track linking up portions of a railroad owned spur affording access to private sidetracks, permitted its use by the railroad for the transportation of livestock to packing house sidetracks only upon condition that it be paid an amount (as rental) equal to its fee for receiving and unloading such shipments. This Court struck down such arrangement, stating: (333 U.S. 169, 175)

> "The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first Act, and all amendments to it, have aimed at wiping out discriminations of all types, New York v. United States, 331 U.S. 284, 296, 91 ed 1492, 1507, 67 S Ct 1207, and language of the broadest scope has been used to accomplish all the purposes of the Act. United States v. Pennsylvania R. Co. 323 US 612, 616, 89 L ed 499, 506, 65 S Ct 471. It would be

> strange had this legislation left a way open whereby carriers could engage in discriminations merely by entering into contracts for the use of trackage. In fact this Court has long recognized that the purpose of Congress to prevent certain types of discriminations and prejudicial practices could not be frustrated by contracts even though the contracts were executed before enactment of the legislation . . ."

The Court then pointed out that *all* discrimination is prohibited, and that indirect discrimination by contract is no excuse, stating: (333 U.S. 169, 176-177)

> "It is just as prejudicial to shippers and the public for a railroad that uses a portion of track under lease or contract to discriminate, as it is for the discrimination to be inflicted by a railroad which owns the entire track . . .
>
> ". . . The excuse offered by the railroad is that the owner of Track 1619 required them to do the prohibited things. But the command of Congress against discrimination cannot be subordinated to the command of a track owner that a railroad using the track practice discrimination."

It would be superfluous for petitioner to argue in extenso the analogy between the discrimination which offends the Interstate Commerce Act and the discrimination which offends the constitutional guarantee of equal protection of the laws. Plainly, a factual situation which would offend the Interstate Commerce Act if the commerce were interstate, violates the constitutional guarantee when the factual context is state approval of acts in intrastate commerce by interstate railroads.

The plain principle of the *Baltimore* case is controlling here — however a railroad may phrase its contracts for track rental, it may not use such contractual conditions to justify a discrimination between its customers. And state action, approving such discrimination, is automatically indicted under the Fourteenth Amendment.

Other cases have reached the same result as *Baltimore*. Thus, in *Virginian Railway Co. v. United States,* 272 U.S. 658, this Court struck down the accidental discrimination caused by the operation of a joint trackage agreement, stating that the crucial fact was the discrimination and the contract was "not of legal significance" (272 U.S. 658, 664-665).

So, too, as the Interstate Commerce Commission pointed out in *Huerfano Coal v. Colorado & Southeastern et al.,* 41 I.C.C. 657 at 659:

> "Trackage arrangements have been considered by the Commission in a number of cases, in none of which have we ever allowed the contracting carriers under cover thereof to work unjust discrimination against shippers or localities."

3. The Interstate Commerce Commission twice passed upon the 1912 Southern Pacific-Santa Fe contract in denying the use of such surcharge-penalty provision to justify discriminatory *interstate* rates.

In the first case, *Monolith Portland Cement Company v. Santa Fe,* 169 I.C.C. 689, the Commission refused to consider the contract, holding it not to be in issue, when determining whether cement rates from Monolith to Nevada (primarily cement for Boulder Dam construction) were discriminatory when compared with

rates from other Southern California cement plants (including the rates from Victorville, California, one of the group plants here involved).

In the second case, *Blue Diamond v. Santa Fe*, 171 I.C.C. 175, the Commission held that notwithstanding such track rental formula, gypsum rates from Arden (Las Vegas) Nevada, to Monolith, California, were discriminatory to the locality Monolith to the preference of other Southern California gypsum consuming points which were not located upon the tracks involved in this joint trackage agreement.

However, notwithstanding such explicit refusal by the Interstate Commerce Commission to base *interstate* rates upon the Santa Fe-Southern Pacific arrangement, the California Commission erroneously assumed that the I.C.C. had "approved" the contract, and that such assumed approval is justification for imposing, discriminatory *intrastate* rates. (Opinion, p. 59.)

4. The decision below sets at naught the national transportation policy of non-discriminatory transportation rates. The legislative history of the Interstate Commerce Act "shows clearly that the evil of discrimination was the principal thing aimed at." *Louisville & N.R. Co. v. United States*, 282 U.S. 740, 749-750.

Here, while the jurisdiction over the railroads' trackage contract is possessed by the Interstate Commerce Commission, the power over intrastate rates is possessed by the state. May the state, contrary to the record, "presume" in advance the Interstate Commerce Commission's "approval" of a principle contrary to the decisions of this Court and the Commission, and so thwart national policy?

We respectfully submit that the Equal Protection clause is peculiarly appropriate to reach such state action so at variance with fundamental notions of equal treatment to those equally situated. ". . . Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand." *Hill v. Texas*, 316 U.S. 400, 406.

Conclusion.

For the reasons stated, this petition for certiorari should be granted, the order below reversed, and the case remanded for disposition in accordance with the Fourteenth Amendment, and the example of *United States v. Baltimore & O. R. Co.*, 333 U.S. 169.

Respectfully submitted,

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APPENDIX.

Order Denying Writ of Review.

In the Supreme Court of the State of California, in Bank. S. F. No. 21603.

Monolith Portland Cement v. Public Utilities Commission.

Filed June 16, 1964, William I. Sullivan, Clerk.

Petition for writ of review denied.

William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 22nd day of June A.D. 1964.

William I. Sullivan, Clerk
By G. E. Bishel.
Deputy Clerk

Gibson
Chief Justice